

ADMINISTRATIVE APPEAL DECISION

NORTHBROOK SPORTS CLUB, FILE NO. 200100288

CHICAGO DISTRICT

JULY 26, 2001

Review Officer: Suzanne L. Chubb, U.S. Army Corps of Engineers, Great Lakes and Ohio River Division, Cincinnati, Ohio.

District Representative: Mr. Brian Smith, Chicago District, Chicago, Illinois.

Appellant Representative: Mr. William J. Anaya, Johnson & Bell Ltd., Chicago, Illinois

Jurisdiction: Section 404

Receipt of Request For Appeal (RFA): 27 April 2001

Appeal Conference/Site Visit: None

Basis for Appeal as Presented by the Appellant:

Reason 1: The subject parcel contains an isolated, non-jurisdictional intrastate wetland, not adjacent to waters of the United States.

Background Information: The appellant operates an existing shooting club in the Village of Hainesville, Lake County, Illinois. The Chicago District (District) received an application request on 4 January 2001 to drain 15 acres of wetland within the Sports Club's shotfall area. Later, in a letter dated 20 February 2001, the appellant's consultant requested a jurisdictional determination (JD) of the site. To determine Federal jurisdiction, the District reviewed information submitted by the appellant with its 20 February 2001 JD request. A letter, dated 28 February 2001 to the appellant, informed them that the subject property contained jurisdictional "waters of the United States". Discussions between the District, appellant and his consultant regarding the JD later prompted the District project manager (PM) to perform a site visit on 9 March 2001. The District verified their initial findings regarding jurisdiction and informed the appellant's consultant of this. The appellant has appealed this determination to the Division office.

The District submitted the following information in support of their JD:

Letter from Hey and Associates, Inc., dated 20 February 2001, with exhibits (3)
Letter from Hey and Associates, Inc., dated 6 Mar 2001, with enclosures
(Wetland Relocation Management & Monitoring Plan with all exhibits and appendices)
Handwritten note by PM dated 9 Mar 2001

Color photos taken by the District dated 17 May 2001

In an 18 June 2001 letter to the appellant, signed by Brigadier General Robert H. Griffin, I was delegated the authority to serve as both the Review Officer and decision authority regarding this RFA. This delegated authority is allowed by regulations at 33 CFR 331.3(a)(1).

Appeal Decision and Instructions to Chicago District Commander (DE):

Reason 1: The subject parcel contains an isolated, non-jurisdictional intrastate wetland, not adjacent to waters of the United States.

Finding: This appeal reason does not have merit.

Action: No action needed relative to the appeal. However, I have noted where the District should improve its administrative record when evaluating and documenting JDs and must revise their template language of certain letters.

Discussion: The appellant believes that the northern wetland parcel (labeled WL 3 on the attached aerial) is isolated from the southern wetland parcel (labeled LCWI 1) due to the presence of a two-lane road. The appellant received a Department of the Army (DA) permit in 1987 for the road and completed required mitigation for the wetland impacts (DA file no. 8428701). The RFA cites Corps regulations at 33 CFR 328 and discusses the meaning of the term "adjacent".

In the initial February 2001 determination, the District's letter stated "Those wetlands which drain through the surface level culvert of the access road and/or to Squaw Creek are jurisdictional waters of the United States." An attachment to the District's letter lists the basis for jurisdiction as "The subject parcel contains tributaries to navigable or interstate 'waters of the U.S.' pursuant to 33 CFR 328.3(a)(5)." I note that the District did not include "wetlands adjacent to waters" as a basis for jurisdiction pursuant to 33 CFR 328.3(a)(7).

Two factors are considered when determining adjacency, actual proximity of the wetland to the waterway and hydrologic connections between the wetland and waterway. Regulations at 33 CFR 328.3^{328.3(c)}(~~5~~)(7) state, "The term adjacent means bordering, contiguous or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands'." Although the appellant correctly cited this regulation in the RFA, they chose a narrow and incorrect interpretation of the definition. Although "road" is not explicitly mentioned in the definition, it is, in this case, a man-made barrier or obstruction separating portions of a once intact wetland adjacent to Squaw Creek. The road, although authorized by the Corps and appropriately mitigated, does not negate a finding of adjacency in this instance. A railroad bed is another example of a relatively narrow, man-made feature that would not negate adjacency.

Furthermore, the presence or absence of a culvert, and the invert elevation of an existing culvert, do not change this finding. The appellant asserts that an existing road culvert conveys only overflow during high water events and thus is not an “ecological conduit between the two wetland complexes”. As stated earlier, a hydrologic connection is only one consideration of “adjacency”. Proximity is also a highly relevant factor. The onsite wetland was clearly one complex prior to installation of the road. Also, Corps regulations allow for narrow, upland features within the definition of “adjacent”. With regard to the culvert elevation, the site topography in this area is relatively flat with a predominant elevation of 780 feet (datum not provided) indicated on both sides of the road (2001 Drain Tile Investigation by Hey and Associates, Inc.). This indicates that surface water flow would be relatively slow throughout and between the wetlands. The functionality of a culvert is questionable, whether installed at the wetland elevation or otherwise.

At 33 CFR 330.2, the Corps’ regulations define the term “isolated waters” as non-tidal waters of the U.S. that are 1) not part of a surface tributary system to interstate or navigable waters of the U.S.; and 2) not adjacent to such tributary waterbodies. The District’s basis for jurisdiction was the presence of tributaries to navigable or interstate “waters of the U.S.”. I find that this is an accurate statement and supported by the District’s administrative record. Squaw Creek is a tributary to the Fox River, an interstate, navigable water. The southern wetland parcel (LCWI 1) is adjacent to Squaw Creek; the northern wetland parcel (WL 3) was previously part of and is adjacent to LCWI 1; and therefore, WL 3 is not an isolated water.

My review of the District’s record did reveal two deficiencies in the District’s process. First, the administrative record did not contain a document that clearly indicated the resources considered by the District when evaluating the JD, and that clearly explained the rationale of the District’s decision. Second, the 28 February 2001 JD letter contained vague, contradictory and incorrect statements. The following problems were noted:

1. On page 1 of the letter, several resources were listed as being reviewed and considered in the JD decision. However, phone conversations with the PM revealed that some of these items were not reviewed and that there is a general lack of certainty as to what in-house resources were consulted. The PM said this clause (first sentence, second paragraph) is part of the template language of the JD letter. The District should ensure that review of the appropriate documented resources is actually conducted and that the JD letter accurately reflects this procedural action. A memorandum to the file that details the resources considered would also clarify the record.
2. The letter stated that the property contains jurisdictional waters, including wetlands, but that the jurisdictional status of other onsite wetlands could not be determined (page 1). Not only is this statement unclear but it should not be used. The District should make all requested JD decisions in consultation with the District Counsel and in accordance with past practices, the appropriate

regulations, 1987 Corps wetland delineation manual and the 19 January 2001 memorandum by Chief Counsel Robert Anderson. If additional guidance is required, the District should consult with Division and Headquarters staff.

3. The letter is contradictory when it states that the determination is not a concurrence with the wetland delineation (page 1) and then states "This confirmation of your wetland delineation is valid for a period of five years." (page 2). The District should revise the template language of the JD letter to correct these inconsistencies. The Regulatory staff should also be reminded to tailor template letters to the specific project and to proofread carefully.
4. The District incorrectly advised the applicant as to the correct appeal process. In the second paragraph on page 2, the letter stated that the applicant must submit his completed RFA form to the District office. This is contrary to the appeal regulations at 33 CFR 331.6. The appellant is only required to further coordinate with the District if they object to an initial proffered permit or submit "new" information for consideration. I advised the District of this error early in the appeal review and an email message from Ms. Leesa Beal, dated 17 May 2001, indicates that this template language has been corrected. The District shall submit revised draft individual permit and JD "template" letters consistent with the comments above to me for review and approval. Prior to submittal, the District Counsel shall review the documents and include a certification of legal sufficiency.

Conclusion: For the reasons stated above, I conclude that this Request For Appeal does not have merit. I have noted where the District should improve its administrative record when evaluating and documenting JDs and must revise their template language of certain letters. The District shall submit the corrected individual permit and JD "template" letters to me for review and approval.

FOR THE COMMANDER:



SUZANNE L. CHUBB
Appeal Review Officer
Great Lakes & Ohio River Division